No. 4393

13

United States

Circuit Court of Appeals

For the Ninth Circuit.

HENRY HEITMAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Defendant and Plaintiff in Error:
EDWARD A. O'DEA, Esq., Phelan Bldg., San Francisco, California.

For Plaintiff and Defendant in Error:
UNITED STATES ATTORNEY, San Francisco.

In the Southern Division of the United States District Court for the Northern District of California.

Clerk's Office.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HEITMAN,
Defendant.

PRAECIPE (FOR TRANSCRIPT OF RECORD).

To the Clerk of Said Court:

Sir: Please prepare the transcript of record upon writ of error in the above-entitled cause and the following:

1. Information.
2. Arraignment.
3. Plea of defendant.
4. Record of trial.

5. Verdict of jury.
6. Motion for new trial.
7. Motion in arrest of judgment.
8. Order denying motion for new trial.
9. Order denying motion in arrest of judgment.
10. Judgment of the Court.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error and supersedeas.
14. Bill of exceptions.
15. Writ of error (original).
16. Citation on writ of error.
17. Return thereto. [1*]
18. Clerk's certificate to transcript of record.

EDWARD A. O'DEA,
Attorney for Defendant.

[Endorsed]: Filed Oct. 20, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HEITMAN and J. HARRIS,
Defendants.

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*Page-number appearing at foot of page of original certified Transcript of Record.

INFORMATION.

At the March term of said court in the year of our Lord one thousand nine hundred and twenty.

BE IT REMEMBERED that John T. Williams, United States Attorney for the Northern District of California, by and through Kenneth M. Green, Special Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 13th day of June, 1923, and with leave of the said court first having been had and obtained, gives the court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof:

NOW, THEREFORE, your informant presents. THAT

HENRY HEITMAN and J. HARRIS

hereinafter called the defendants, heretofore, to wit, on or [3] about the 4th day of June, 1923, at 950 Hampshire St., in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there willfully and unlawfully maintain a common nuisance in that the said defendants did then and

there willfully and unlawfully keep for sale on the premises aforesaid certain intoxicating liquor, to wit:

2 120–gallon stills; 4 burners; 2 pressure tanks; tanks;

5 500–gallon vats, 3 hydrometers; 3,000 gallons of mash; 100 gallons of what is called jackass brandy.

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof. [4]

NOW, THEREFORE, your informant presents: THAT

HENRY HEITMAN and J. HARRIS,

hereinafter called the defendants, heretofore, to wit, on or about the 4th day of June, 1923, at 950 Hampshire St., in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there being, did then and there willfully and unlawfully possess certain intoxicating liquor, to wit:

2 120–gallon stills; 4 burners; 2 pressure tanks; 5 500–gallon vats; 3 hydrometers, 3,000 gallons of mash; 100 gallons of what is called jackass brandy

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 18, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a [5] part hereof.

NOW, THEREFORE, your informant presents: THAT

HENRY HEITMAN and J. HARRIS

hereinafter called the defendants, heretofore, to wit, on or about the 4th day of June, 1923, at 950 Hampshire St., in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there being, did then and there willfully and unlawfully have in their possession certain property designed for the manufacture of certain intoxicating liquor, to wit:

4 burners; 2 pressure tanks, 5 500-gallon vats; 3 hydrometers; 3,000 gallons of mash; 100 gallons what is called jackass brandy,

then and there intended for use in violating Title II of the Act of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendants at the time and place aforesaid was

then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney.
KENNETH M. GREEN,
Special Asst. U. S. Attorney. [6]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

E. A. Powers, being first duly sworn, deposes and says: THAT

HENRY HEITMAN and J. HARRIS,

on or about the 4th day of June, 1923, at 950 Hampshire St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there maintain a common nuisance in that the said defendant did then and there keep for sale on the premises at 950 Hampshire St. aforesaid certain intoxicating liquor, to wit:

2 120-gallon stills, 4 burners, 2 pressure tanks, 5 500-gallon vats, 3 hydrometers, 3,000 gallons of mash, 100 gallons of what is called jackass brandy

then and there containing one-half of one per cent

or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid further deposes and says: THAT

HENRY HEITMANN and J. HARRIS,

on or about the 4th day of June, 1923, at 950 Hampshire St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction [7] of this court, did then and there possess certain intoxicating liquor, to wit,

2 120-gallon stills; 4 burners; 2 pressure tanks; 5 500-gallon vats; 3 hydrometers; 3,000 gallons mash; 100 gallons of what is called jackass brandy

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October, 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid further deposes and says: THAT

HENRY HEITMANN and J. HARRIS

on the 4th day of June, 1923, at 950 Hampshire St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there willfully and unlawfully have in their possession certain property designed for the manufacture of intoxicating liquor, to wit:

2 120-gallon stills; 4 burners; 2 pressure tanks; 5 500-gallon vats, 3 hydrometers; 3,000 gallons of mash; 100 gallons of what is called jackass brandy

then and there intended for use in violating Title II of the N. P. A. in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes; [8]

That the possession of the said property by the said ——— at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II, of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

E. A. POWERS.

Subscribed and sworn to before me this 5th day of June, 1923.

[Seal] T. L. BALDWIN,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed June 13, 1923. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [9]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 14th day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable WILLIAM C. VAN FLEET, Judge.

No. 13,551.

UNITED STATES OF AMERICA

vs.

HENRY HEITMAN et al.

MINUTES OF COURT—JUNE 14, 1923—ARRAIGNMENT AND PLEA.

In this case defendant Henry Heitman was present with his attorney. J. F. McDonald, Esq., Asst. U. S. Atty., was present on behalf of United States. Said defendant was arraigned and plead "Not Guilty." On motion of Mr. McDonald Court ordered case continued to June 16, 1923, to be set for trial of said defendant.

Further ordered, on motion of Mr. McDonald, that bench warrant issue for arrest and appearance of defendant J. Harris herein. [10]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the sixteenth day of April, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 13,551.

UNITED STATES OF AMERICA

vs.

HENRY HEITMAN et al.

MINUTES OF COURT—APRIL 16, 1924—TRIAL AND JUDGMENT.

This case came on regularly this day for trial of defendant, Henry Heitmann upon information filed herein against him. Said defendant was present with his attorney, E. A. O'Dea, Esq., J. F. McDonald, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Upon calling of case, all parties answering ready for trial, Court ordered same proceed and that the jury-box be filled from regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly drawn by lot, sworn, examined and accepted,

were duly sworn as jurors to try the issues herein, viz.:

Oscar J. Beyfuss,	John J. Parker,
S. Lack,	N. W. Sexton,
G. F. Bernard,	Edward T. Foulkes,
W. F. Block,	Frank W. Beacher,
W. L. Beedy,	Benjamin Pitman,
J. H. Shaw,	John Welch.

On motion of Mr. O'Dea, the Court ordered that all persons to be called as witnesses be excluded from the courtroom, [11] during the introduction of evidence, except when on the stand.

Mr. McDonald made opening statement to the Court and jury as to the nature of the case and called J. Bernard, E. A. Powers, I. H. Cory and J. H. Koss, each of whom was duly sworn and examined as a witness on behalf of United States, and introduced in evidence on behalf of United States a certain exhibit which was filed and marked U. S. Exhibit No. 1, and rested.

Mr. O'Dea moved the Court for directed verdict, which motion the Court ordered denied. Mr. O'Dea was then sworn and testified for defendant. Henry Heitmann was sworn and examined for defendant, and thereupon defendant rested.

Mr. McDonald offered in evidence records in case of United States of America, vs. Henry Hitman, number 12,613 in this court. Court ordered said record admitted in evidence. United States thereupon rested.

Case was then argued by counsel for respective parties and submitted, whereupon the Court proceeded to instruct the jury herein and, after being

so instructed, the jury retired at 2:10 P. M., to deliberate upon their verdict and subsequently returned into court at 3:15 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present, and, in answer to question of the Court, stated they had agreed upon a verdict and presented a written verdict which the Court ordered filed and recorded, viz.: [12]

"We, the jury, find Henry Heitman, the defendant the bar,

Guilty on 1st count,
Guilty on 2d count and
Guilty on 3d count.

A. F. BLOCK, Foreman."

Mr. O'Dea made a motion for a new trial, which motion the Court ordered denied, Mr. O'Dea then made a motion in arrest of judgment, which motion the Court likewise ordered denied.

Thereupon, no cause appearing why judgment should not be pronounced, the Court ordered that defendant Henry Heitman, for offense of which he stands convicted, be imprisoned for period of 1 year in the County Jail, County of San Francisco, State of California, and that he pay a fine in sum of $500.00 or, in default of payment thereof, defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law. Ordered that defendant stand committed to custody of U. S. Marshal to execute said judgment, and that a commitment issue.

Ordered that the amount of bond for release and

appearance of defendant herein, pending writ of error, be and is hereby fixed in sum of $3,000.00.

Ordered that the exhibit introduced in evidence on behalf of United States and marked U. S. Exhibit No. 1 be returned and accordingly same was delivered to Mr. McDonald in open court.

Further ordered that the jurors herein be and are hereby discharged from further consideration of this case. [13]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMAN,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That heretofore the United States Attorney in and for the Northern District of California, did file in the above-entitled Court an information against the defendant, Henry Heitmann, and that, thereafter, the said Henry Heitmann appeared in court and upon being called to plead to said information, pleaded "Not Guilty" as shown by the records herein;

AND BE IT FURTHER REMEMBERED, that the defendant, Henry Heitmann, who will hereafter be called the defendant, having duly pleaded "Not Guilty," and the cause being at issue, the same coming on for trial on Wednesday, the 16th day of April, 1924, before the Honorable John S. Partridge, District Judge of said court, and a jury duly impaneled, the United States being represented by J. Fred McDonald, Esq., Assistant United States Attorney, and the defendant being represented by Edward A. O'Dea, Esq., and the following proceedings were had:

J. Fred McDonald, Esq., Assistant United States Attorney, made an opening statement of the case to the jury.

EXCEPTION No. 1.

(Thereupon, Mr. O'Dea addressed the Court in the following language:) [14]

Mr. O'DEA.—"If your Honor please, at this time I ask that the witnesses be excluded."

The COURT.—"All witnesses on both sides will be excluded, except the one designated by the District Attorney to remain with him during the trial."

Mr. O'DEA.—"We have only the defendant."

Mr. McDONALD.—"We ask to have Agent Powers remain here."

Mr. O'DEA.—"Then I ask that Agent Powers be put on the stand first."

The COURT.—"I cannot direct the order of proof on the part of the Government, Mr. O'Dea."

Mr. O'DEA.—"Then that will defeat the purpose of my motion, I don't want these witnesses testify-

ing to the same thing simply because one listens to the other.

The COURT.—"You know, Mr. O'Dea, the rule is that the Government is entitled to designate one officer who may remain in the room. I cannot control the order in which they shall take the stand. However, I think there will no objection to putting Mr. Powers on first."

Mr. McDONALD.—"Your Honor, I want to put Mr. Bernhard on first."

The COURT.—"Then I cannot control that. I am bound by the statute in the matter."

Mr. O'DEA.—"Exception."

(Thereupon, the plaintiff, to maintain the issues on its part to be maintained, introduced and offered in evidence the following testimony, to wit:)

TESTIMONY OF J. BERNHARD, FOR THE GOVERNMENT.

J. BERNHARD, called for the United States, being sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Officer and was such on the 24th day of [15] June, 1923. On that day, I accompanied Agent Powers to 950 Hampshire Street. When we were within a block of the place, Agent Powers told me that he had information of a still being operated at that number. We got within a block of the place and he said, "Do you smell it?" and I said, "I can smell it very plainly." Coming down to the place, we first went to a little

(Testimony of J. Bernhard.)

office. I believe it was an office. It was kind of a dilapidated building there and took the man who was manager or watchman with us; we went over to this building and I guarded the back window, and Agent Powers went in through the shop. There was a man painting ladders there. I stood at this corner with the manager or watchman and Powers went in through a back door that was partitioned off in the back part of the shop, and he hollered "Federal Officer." I came in then and went up a ladder, up through a trap-door into the upper floor. It was an old barn originally, I believe, and there we found two twenty-gallon stills complete and they were going; fires were under them; they were running full blast. Three thousand gallons of mash; one hundred gallons of jackass brandy; three hydrometers; two pressure tanks; 5 500-gallon vats; 8 15-gallon kegs; three fifty-gallon barrels; four burners, three water buckets and a lot of coal-oil. In the rear of this place, like in the corner, there was a door leading out of the rear of this paint-shop, or barn, and there were two cars there, one was a Ford touring car and the other was a Ford truck. When we got in there, there was nobody up where the stills were going full blast. On going over to the window, we found a cord rope, a cotton cord rope hanging out of the window. The window was open. Whoever was up there operating, there was only one way to get down out of there and that was down that rope. Next door there was a big cooperage place with about a 20-foot fence all a-

(Testimony of J. Bernhard.)

round it, and barrels were piled up high. I then left that place and went over to a drug store and phoned to the office to send out a truck. I left Agent Powers there. When I [16] came back Powers and Heitmann were walking towards me. Powers said, "This is Heitmann; you know him, don't you?" Then Heitmann said, "Now, listen here, can't we fix this thing up."

EXCEPTION No 2.

Mr. O'DEA.—"I ask that that be stricken out (last remark), your Honor."

Mr. McDONALD.—"Heitmann said that?"

WITNESS.—"Yes, sir."

Mr. O'DEA.—"I ask that that be stricken out as immaterial, irrelevant and incompetent and hearsay."

The COURT.—"Motion denied."

Mr. O'DEA.—"Exception."

WITNESS.—(Continuing.) He said, "Can't we fix this thing up? I don't want any trouble." We both laughed at him. We started walking down toward the corner. Then he got a change of heart and said: "Well, I don't care, you fellows haven't got anything on me, anyhow. I didn't have anything to do with that place." His first request, though, was that we fix it up.

EXCEPTION No. 3.

Mr. McDONALD.—"Do you know the defendant, Heitmann, outside of this occasion?"

WITNESS.—"Yes, I have—

(Testimony of J. Bernhard.)

Mr. O'DEA.—"Now, just a moment, I object to that, your Honor, as immaterial, irrelevant and incompetent, and there is nothing involved here which would authorize the District Attorney to elicit the information sought."

Mr. McDONALD.—"Your Honor, there are two charges in this case, one a charge of maintaining a nuisance, and the other the possession of property designed and intended for the manufacture of liquor, on both of those charges we are entitled to introduce and will introduce evidence of the prior arrest and prior conviction of this defendant." [17]

Mr. O'DEA.—"I ask your Honor to instruct the jury against that. That is prejudicial error on the part of the District Attorney."

The COURT.—"Mr. O'Dea, I have passed upon that day after day and day after day. I have uniformly held, and I am satisfied I am right, that where there is a charge of nuisance, evidence of other similar offenses is admissible."

Mr. O'DEA.—"If the Court please, I would like to argue this matter."

The COURT.—"What is the use? I have had it argued time and time again. I have read every authority upon the question and my mind is thoroughly made up. There is no use of repeating arguments on the same question time after time in the welter of cases that I have here. I know the authorities that you will cite, I know them well. I don't agree with you. I am satisfied that the rule in

(Testimony of J. Bernhard.)

regard to nuisance is the rule laid down by the Supreme Court of California in the Redlight Abatement litigation, and that is to the effect that where a nuisance is charged and where the jury must determine as a necessary concomitant of the nuisance what the purpose was for which he had the liquor that it is proper for them to determine that question in the light of previous offenses of the same character. You know the matter has been so fully argued here, and I have called the attention of the bar to this question a number of times. The Supreme Court of California, in People vs. Gray, and the House of Lords in King vs. Manning, and Prof. Wigmore, have all come, independently of one another, to the same conclusion, and that is this, that where the question of intent and the course of general conduct and purpose are questions at issue, that evidence of other similar offenses is admissible. So I have made up my mind on it, Mr. O'Dea. If I am wrong you know how to correct it."

Mr. O'DEA.—"That is not the question I am going to raise. I admit there is the line of authorities your Honor suggests. But that is to show guilty knowledge once they have connected the [18] defendant up with it. They have not connected the defendant up with it at all—

The COURT.—"But you can't prove a case all at once. That is a question of the order of proof. Besides that, the witness has testified this defendant said, 'Can't we fix this up?' You know the

(Testimony of J. Bernhard.)

authorities are unanimous that evidence of that kind is evidence to be considered by the jury as evidence of guilt."

Mr. O'DEA.—"What I want to point out to your Honor is this: There is no evidence here that the defendant was in possession of that stuff, even though he said, 'Can't we fix it up?' What your Honor says might be all right to prove guilty knowledge, or to prove intent, but not to establish a case against the defendant. They must first connect him with that place."

The COURT.—"Well, I think he has been connected. The objection is overruled."

Mr. O'DEA.—"Exception, and I take an exception to your Honor's refusal to instruct the jury as to the remarks of the District Attorney as well."

The COURT.—"Of course, I will do that. The remarks of the District Attorney as to what he expects to prove, Gentlemen, are not evidence. You understand that, I think. Unless it is followed up by evidence from the witnesses, you will disregard it."

Mr. McDONALD.—"Under the ruling of the Court, will you answer my question, did you know Mr. Heitman prior to this date?"

WITNESS.—"I did."

Mr. McDONALD.—"Had you arrested him before?"

WITNESS.—"Well, no, I was not one of the arresting officers, but I came there afterwards, after he was arrested."

(Testimony of J. Bernhard.)

Mr. O'DEA.—"It is understood, your Honor, that I have an objection and an exception to this line of testimony?"

The COURT.—"Yes." [19]

On cross-examination, the witness testified as follows: I could not tell you between what streets 950 Hampshire Street is located. The building from all outward appearance was formerly a barn. There are several manufacturing places around there if I remember right. I first saw the defendant on the sidewalk walking toward me from this 950 Hampshire Street. The barn had an upper and lower floor. On the lower floor, I said before there was a man painting ladders. He had overalls on. I don't know whether it was a regular paint-shop or not. The upstairs portion, I would call a loft of a barn where they formerly stored hay. From the street to the barn where this property was found you would have to go up through a trap-door. The trap-door was in the rear of the paint shop. There was a ladder leading up to the trap-door. When we got up there, Heitmann was not there. I did not see Heitmann at all until I saw him outside with Powers. Heitmann did not offer me any money. All he said to me was, "Can't we fix this up?"

On redirect examination, the witness testified as follows: The bottle I am shown bearing the Internal Revenue label on it is my handwriting. I got the contents of that bottle out of the worm of the still. It was dripping into the bucket. When I

(Testimony of J. Bernhard.)

say, "the worm of the still," I mean the worm of the still at 950 Hampshire Street. I took that bottle and I turned it over to the Internal Revenue Chemist. (Thereupon the bottle and its contents was introduced for purposes of identification and was marked Government's Exhibit 1.)

TESTIMONY OF E. A. POWERS, FOR THE GOVERNMENT.

E. A. POWERS, called for the United States, being sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Agent and was such on the 4th day of June, 1923. I had occasion to visit the premises at 950 [20] Hampshire Street."

EXCEPTION No. 4.

Mr. McDONALD.—"Will you kindly tell the Court and jury just what happened there and just what you did there?"

WITNESS.—"For the period of about six or seven weeks I had been following Mr. Heitmann on account of remarks he made around town, and it led me into the vicinity of—"

Mr. O'DEA.—"I object to that and ask that it be stricken out."

The COURT.—"Motion denied."

Mr. O'DEA.—"Exception."

WITNESS.—(Continuing.) Hampshire Street. I found that twice he entered the premises on

(Testimony of E. A. Powers.)

Hampshire Street. I have reference to 950 Hampshire Street. There are a lot of small buildings there. I don't know which building he went into. I continued spotting around that place until I got a smell. In fact, you could smell the still in operation and the mash fermenting a block away. So on this date, in company with Mr. Bernhard, I entered the premises. I walked into the little office. I got the manager of the properties I said, 'You have a still operating here.'

Mr. O'DEA.—"Was the defendant there?"

WITNESS.—"No, the defendant was not there."

Mr. O'DEA.—"I object to this as hearsay."

The COURT.—"Just omit what you said."

WITNESS.—(Continuing.) "We walked in and took the manager of the properties with us; we walked back toward the end. I asked Mr. Bernhard to guard the front of the barn while I went around the rear. Then I walked into this barn and on the bottom floor was a man painting ladders. It is not a paint-shop. He had just been repairing and painting ladders in there. The rear was sort of partitioned off and a lock on the door. I broke that lock open and climbed up the ladder. These stills were in operation. I seized [21] the stills; I asked Mr. Bernhard to phone the office, to Mr. Wheeler, who was in charge at that time. I walked downstairs. The manager of the property was still with me. While I was there, the manager asked me come out in the yard. We walked out in the yard. A few minutes afterwards the defendant, Heine

(Testimony of E. A. Powers.)

Heitmann, walked in. He looked around and I said, 'How do you do?' He said, 'How do you do?' I recognized him, and I knew who he was. He walked out. He walked directly to where there were two Ford machines. The manager walked up to him. I was about ten or twelve feet behind; as he walked towards this machine the manager called him and said, 'Here is one of them.' I said, 'Who operates the still?' and he said, 'Yes.' I said, 'All right, Mr. Heitmann, you are under arrest, come back.' We walked back to where the stills were. I said, 'You know me, don't you, Federal Agent Powers?' He said, 'Yes, Powers,' I said, 'You are under arrest.' He said, 'Can't we fix it up?' Bernhard was coming down the stairs and I said, 'Wait a minute, let us tell Bernhard about it.' We walked over to Bernhard and he said again, 'Can't we fix it up, fellow, I am in a jam'—some remark along that line. Bernhard laughed and I laughed. Walking down to the station he said, 'I am an old ballplayer; I can run.' I said, 'All right, start to run, I have a pocket of rocks, I can throw them at you.' We booked him at the station. I had not arrested him before. In this place, was the property testified to by Agent Bernhard.''

On cross-examination, the witness testified as follows: I have not lived in the Mission a long time. I know quite a little about those streets.

(Testimony of E. A. Powers.)

950 Hampshire Street is at the corner of Mariposa and Hampshire Streets. Mariposa is the street between 17th and 18th. This place was right on the corner. I don't think 950 Hampshire Street is between 21st and 22d Streets. I am quite sure I know. Heitmann didn't have a chance to offer me any money. He wanted me to know if he couldn't fix it up and I laughed at him. I didn't see any money. There was no actual tender of money. As soon as he said that I laughed and said, "Here is Bernhard, tell Bernhard [22] about it. "He didn't ask me to let him go upon the payment of money or anything of that kind, just to fix it up. The man who was in charge of the place said, "There is one of them," right in the defendant's presence about three or four feet away. The manager was looking toward me when he said it. We raided that place about two or two-thirty. We left about four or five o'clock. We first saw the defendant that day when he walked in there. I would judge about an hour or three-quarters of an hour after we raided the place. When he saw me he stopped. He walked in the paint-shop and when he saw me he stopped.

Q. He didn't go up to where the stills were at all?

A. He was going in that general direction when he saw me. He did not go upstairs at all when he saw me. The paint-shop, I would not call it a paint-shop. There were men in there fixing and painting ladders.

Q. Was there anything else there to paint?

(Testimony of E. A. Powers.)

A. Very little paint there.

The building on the corner is an old ramshackled building; there is a cluster of buildings there. On Mariposa Street there is an entrance which leads to the back of these buildings. The defendant was downstairs. The stills were upstairs, he didn't have an opportunity to go up there. I was not at the time, where the stills were, and the defendant was not up there. He was not there while I was there at all. I don't remember that the defendant, Heitmann, said anything when the landlord made the remark stated. It is possible that he said something. [23]

TESTIMONY OF I. H. CORY, FOR THE GOVERNMENT.

I. H. CORY, called for the United States, being sworn, testified as follows:

Direct Examination.

K know the defendant, Heitman.

EXCEPTION No. 5.

Mr. McDONALD.—"Did you ever have occasion to arrest him?"

Mr. O'DEA.—"I object to that as immaterial, irrelevant and incompetent, and not the manner in which to prove a case. He can supply evidence —no, he could not even do that—that the defendant was convicted of a felony. This witness would not be permitted to testify in that matter if there are records which can be produced."

(Testimony of I. H. Corey.)

The COURT.—Objection overruled.

Mr. O'DEA.—Exception. [24]

WITNESS.—"Yes, sir."

WITNESS.—(Continuing.) I saw the defendant at a place called Vallimar.

EXCEPTION No. 6.

Mr. McDONALD.—"What was he doing at that time and place?"

Mr. O'DEA.—"The same objection."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—(Continuing.) He was in a barn at the time, in Vallimar Canyon, an old barn way up at the head of the canyon. He was there with a man by the name of Lephart, who, I believe, also has been arrested. They were tacking up building paper; in fact, they had tacked up black paper all around this barn, and were preparing it to operate an illicit distillery. They had a large tub there in the center. Evidently it was for a worm tap. There was no worm there and no still there at the time. Agent Toft and I went into the place. He was there with his partner Lephart. They came out and laughed at us and said, "You fellows are just about a week ahead of time."

EXCEPTION No. 7.

Mr. O'DEA.—"I object to this witness testifying to occurrences as to what happened before. This defendant is being tried on information 13,55J and nothing else."

(Testimony of I. H. Corey.)

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

On cross-examination, the witness testified as follows:

We did not go into this house and break down the door without the authorization of a search-warrant. Vallimer is the canyon that comes out into Rockaway Beach.

EXCEPTION No. 8.

Mr. O'DEA.—The defendant was never convicted for that, was he?

WITNESS.—No, he never was arrested. [25]

Mr. O'DEA.—"Then I ask that that be stricken out, your Honor.

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

TESTIMONY OF K. H. KOSS, FOR THE GOVERNMENT.

K. H. KOSS, called for the United States, being sworn, testified as follows:

Direct Examination.

I am a chemist by trade. I reside at 2604–18th Street. I was the manager of the barn at 950 Hampshire Street. I know the defendant, Heitman; he belongs to my lodge. I remember the day Agent Powers came there. He came there quite often. I saw him previous to that date. He came there quite often to see me. He comes to the office quite often, at 2604–18th Street. All

(Testimony of K. H. Koss.)

the buildings are on the same property. I don't mean to say that I saw him in the building on Hampshire Street; I very seldom go there. The buildings are continually locked up. If you want to see me you have to come to 18th and Hampshire Streets. I rented the premises at 950 Hampshire Street where the stills were. I rented it to a fellow named Harris. He represented himself to be Harris. He has hair a little fairer than mine. He had a light suit on. They were going to wash bottles in there. The premises below I rented to a painter. There were stairs that went up from the paint-shop but we took the stairs down and made provision to go up from the yard. They have the bottles there still. They brought 3,000 or 4,000 bottles there to wash. I remember the day that Mr. Powers was there and I remember pointing out Mr. Heitmann to Mr. Powers. I remember telling Mr. Powers, "There is one of them now." Mr. Powers says there were quite a few fellows coming there—well, there is quite a few coming there. This morning I told Mr. Powers to get a subpoena out for me so that the lodge members would not think I came voluntarily to testify against Mr. Heitmann. Mr. Powers told me to come to court. [26]

On cross-examination, the witness testified as follows: The number of that place, I don't really know whether it is 590 or 950. You have me confused, I think it is 590. I have been three years on that property.

(Testimony of K. H. Koss.)

Mr. O'DEA.—"If you were given permission, how long would it take you to find out?"

Mr. McDONALD.—"What is the difference?"

Mr. O'DEA.—"It makes some difference to us."

WITNESS.—"It is 590."

The COURT.—"What difference does it make?"

Mr. O'DEA.—"The information charges him with having an enclosure at 950 Hampshire Street, San Francisco, and it turns out that it is 590."

The COURT.—"What difference does that make?"

Mr. O'DEA.—"There is a variance between the information and the proof."

The COURT.—"The place has been described as a certain place. A misnomer, or wrong number, would not make a particle of difference. There is nothing to that."

WITNESS.—"Your Honor, it is 590."

The COURT.—"Well, I don't care which it is. If there is a still running there, it doesn't make any difference whether it is 590, or 950, or 9500."

Mr. McDONALD.—"That is the Government's case."

EXCEPTION No. 9.

Mr. O'DEA.—"I move for a direct verdict of not guilty on each of the counts, whether there are two or three, because there is not sufficient evidence here to connect the defendant with any of those counts; and on the second ground, there is a material variance between the information and the proof adduced."

(Testimony of K. H. Koss.)

The COURT.—"Motion denied."

Mr. O'DEA.—"Exception. This question of material variance [27] goes to the count charging the defendant with maintaining a nuisance."

The COURT.—"Motion denied."

Mr. O'DEA.—"Exception."

Mr. McDONALD.—"Your Honor, I ask the privilege of reopening the case just for minute, I want to put on the chemist."

Mr. O'DEA.—"We will stipulate that if there was any liquor there, that it was liquor. You don't have to waste time to put on the chemist."

Mr. McDONALD.—"Then I wish to introduce the bottle in evidence and have it marked as our exhibit in evidence."

The COURT.—"All right."

(The bottle was marked U. S. Exhibit 1.)

(Whereupon the defendant, Henry Heitmann, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony.)

TESTIMONY OF EDWARD A. O'DEA, ON BEHALF OF THE DEFENDANT.

EDWARD A. O'DEA, called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination.

On Sunday last with Mr. Heitmann, I saw the place at 950 Hampshire Street, and if there was such a place it would be between 21st and 22d

(Testimony of Edward A. O'Dea.)

Streets, San Francisco. I saw 590 Hampshire Street. It was the paint-shop with the building upstairs described by the witnesses. It was on Hampshire Street, between 17th and 18th Streets. It was 590 Hampshire Street.

EXCEPTION No. 10.

Mr. McDONALD.—"I ask that all of Mr. O'Dea's testimony be stricken out as immaterial."

The COURT.—"Strike it out; it is entirely immaterial." [28]

Mr. O'DEA.—"Exception noted."

TESTIMONY OF HENRY HEITMANN, IN HIS OWN BEHALF.

HENRY HEITMAN, being first duly sworn, testified as follows:

Direct Examination.

I live at 3337–22d Street. I was arrested some time ago by Agent Powers, at 18th and Hampshire Streets, at 590 Hampshire Street. I was not arrested in 950 Hampshire Street. I didn't own the property designed for the manufacture of liquor and certain liquor that Agent Powers accused me of; and I didn't know that they manufactured liquor there. I did not know that property. I did not pay the rental at 590 Hampshire Street. I did not lease those premises from anybody. I was not engaged in manufacturing liquor at 590 Hampshire Street or at the place that Agent Powers said I was near. I was in the neighborhood at the time, I

(Testimony of Henry Heitman.)

visited an old friend of mine, John Koss. He is the witness who was here this morning. I did not visit the place upstairs over the paint-shop. I generally used to visit him in the office; in the little office that he had, and if he was not in the office I used to go to his laboratory. The office was not in the place where the still was found.

Q. Agent Powers has testified here that you said "can't we fix this matter up?"

A. Well, when Agent Powers arrested me I didn't know what to say. I didn't know what I was arrested for. I said, "What are you arresting me for?" and I might have said through the excitement, "Can't we fix it up?" But I didn't mean for bribing or anything like that. I thought I might explain it to him. I never knew there was liquor in the premises to start in with. I didn't go in the upper part of those premises where the still was.

On cross-examination, the witness testified as follows: I am working for Frank Reno; he is a stableman. His place of business is at 245 Precita Avenue. [29]

EXCEPTION No. 11.

Mr. McDONALD.—"How long is it since you left Salada Beach?"

Mr. O'DEA.—"I object to that as immaterial, irrelevant and incompetent and having nothing to do with the issues in this case; and it is prejudicial error on the part of the District Attorney to even suggest anything except as to the issues involved here."

(Testimony of Henry Heitman.)

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—"About a year ago, I think."

EXCEPTION No. 12.

Mr. McDONALD.—"Why did you leave Salada Beach?"

Mr. O'DEA.—"We object to that also, it has nothing to do with the issues here."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—"Because I didn't like it up there any more."

EXCEPTION No. 13.

Mr. McDONALD.—"Why didn't you like it?"

WITNESS.—"Because I didn't."

Mr. McDONALD.—"What happened to you down there?"

Mr. O'DEA.—"We object to that as immaterial, irrelevant and incompetent, not proper cross-examination and involving questions not at issue in this case."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—"Well, I tried to start a chicken ranch, but it was too cold out there, it was too foggy."

Mr. O'DEA.—"If the District Attorney may be permitted to ask the defendant question, not to try the defendant upon something else, he should ask him was he ever convicted of a felony. That is all he can do." [30]

(Testimony of Henry Heitman.)

The COURT.—"Objection overruled."

Mr. O'DEA.—Exception.

EXCEPTION No. 14.

Mr. McDONALD.—"You had a still down there, didn't you?"

Mr. O'DEA.—"We object to that as immaterial, irrelevant and incompetent, and not proper cross-examination."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

Mr. McDONALD.—"You had two 40-gallon stills at Salada Beach, didn't you, Mr. Heitman?"

WITNESS.—"I did not."

EXCEPTION No. 15.

Mr. McDONALD.—"You were fixing up a place to run a still at Valmar, weren't you?"

Mr. O'DEA.—"Object to the question as immaterial, irrelevant and incompetent, and not proper cross-examination, and prejudicial to the defendant."

The COURT.—"Objection overruled."

Mr. O'DEA.—Exception.

WITNESS.—"I did not."

EXCEPTION No. 16.

Mr. McDONALD.—"You didn't have a still at Salada Beach?"

WITNESS.—"I had one one time, yes."

Mr. McDONALD.—"You had two 40-gallon stills?"

WITNESS.—"I don't remember now, it is too long ago."

(Testimony of Henry Heitman.)

Mr. McDONALD.—"What did you mean by telling me you didn't have one?"

WITNESS.—"I thought you meant Miramar."

Mr. McDONALD.—"If your Honor please, I ask that the Marshal get the record in case No. 12613, United States vs. Harry Heitman."

Mr. McDONALD.—"You were arrested down there by Agent Toft, weren't you? [31]

Mr. O'DEA.—"Objected to as immaterial, irrelevant and incompetent, not proper cross-examination and purposeless."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—"Yes, sir."

(Thereupon the defendant rested, at which time the following proceedings were had:)

EXCEPTION No. 17.

Mr. McDONALD.—"I would like to introduce the record, when it comes here, in that other matter."

Mr. O'DEA.—"I ask that it be introduced now, because I want to object to it."

Mr. McDONALD.—"I introduce the records of this Court in case No. 12,613, United States vs. Henry Heitman, and call particular attention to the defendant's plea of guilty in that case."

Mr. O'DEA.—"We object to that statement, if your Honor please, because it is not based on any evidence at all. He was not asked such a question on the witness-stand. I ask your Honor to so instruct the jury, to disregard it."

The COURT.—"Yes, the jury will disregard it until the record comes. The record is the best evidence."

Mr. McDONALD.—"I offer this record in evidence, if your Honor please."

The COURT.—"Any objection, Mr. O'Dea?"

Mr. O'DEA.—"I object to it on the ground that it is immaterial, irrelevant and incompetent, and it is a prejudicial matter, and has nothing to do with the issues involved in this case."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception. At the same time, let all of the record be admitted in evidence, if your Honor please."

The COURT.—"Yes, you can have it all."

Mr. O'DEA.—"Including the defendant's motion to exclude [32] evidence, part of which motion was granted by Judge Van Fleet. I take and exception to the offer."

(Thereupon the said record in the said case number 12,613, United States vs. Harry Heitmann, was received in evidence. That the following is a true copy thereof.)

That on the 12th day of January, 1923 before his Honor William C. Van Fleet, the United States Attorney for the Northern District of California, obtained an order from said Court granting him permission to file an information against one, Henry Heitman and thereupon the Court fixed bonds in the sum of One Thousand Dollars and ordered a bench warrant to issue for the defendant.

That said information was in the words and figures following, to wit:

"In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,613.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HITMAN,

Defendant.

INFORMATION.

At the —— term of said court in the year of our Lord one thousand nine hundred and twenty-four.

BE IT REMEMBERED that John T. Williams, United States Attorney for the Northern District of California, by and through Kenneth M. Green, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 12th day of January, [33] 1923, and with leave of the said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this in-

formation is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents: That

HENRY HITMAN

hereinafter called the defendant, heretofore, to wit, on or about the 27th day of November, 1922, at Salada Beach, in the County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there willfully, and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit:

2 40-gal. stills; 11 50-gal. barrels of mash; several sacks of corn and sugar; empty bottles and barrels

then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent and more alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendant was then and there prohibited, unlawful and in violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statutes of the said United States of *American* in such case made and provided.

SECOND COUNT. [34]

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents: That

HENRY HITMAN

hereinafter called the defendant, heretofore, to wit, on or about the 27th day of November, 1922, at Salada Beach, in the County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there willfully and unlawfully manufacture, certain intoxicating liquor, to wit:

3 gals. of moonshine brandy,

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit: [35]

That allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents: That

HENRY HITMAN

hereinafter called the defendant, heretofore, to wit, on or about the 27th day of November, 1922, at Salada Beach, in the County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit,

3 gals. of moonshine brandy

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of

Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney.
KENNETH M. GREEN,
Asst. United States Attorney. [36]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Henry Toft, being first duly sworn deposes and says: That

HENRY HITMAN,

on or about the 27th day of November, 1922, at Salada Beach, County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there wilfully and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit:

2 40-gal. stills; 11 50-gal. barrels of mash; several sacks of corn and sugar; empty bottles and barrels

then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which

was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of *Section of* Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid further deposes and says: That

HENRY HITMAN

on or about the 27th day of November, 1922, at Salada Beach, County of San Mateo, in the —— Division of the Northern District of California, and within the jurisdiction of this Court, did then and there manufacture certain intoxicating liquor, to wit:

3 gals. of moonshine brandy

then and there containing one-half of one per cent and more of [37] alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath deposes and says: That

HENRY HITMAN

on or about the 27th day of November, 1922, at Salada Beach, County of San Mateo, in the Southern

Division and district, aforesaid, did then and there possess certain intoxicating liquor, to wit:

3 gals. of moonshine brandy

then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and places aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

HENRY TOFT.

Subscribed and sworn to before me this 11th day of January, 1923.

[Seal] C. M. TAYLOR,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Jan. 12, 1923. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [38]

(That thereafter, and on the 24th day of April, 1923, before the Honorable John S. Partridge, the defendant was arraigned and on motion of the attorney for the defendant, the Court ordered said cause continued to the 28th day of April, 1923, to plead.)

(Minutes of court, April 24, 1924.)

(And thereafter, to wit, on the 28th day of April, 1923, before the Honorable William C. Van Fleet, the attorney for the United States and the defend-

ant, without counsel being present, said defendant was called to plead and thereupon said defendant plead not guilty. On motion of the attorney for the United States, the case was continued to May 2, 1923, for trial.)

(Minutes of court, April 28, 1923.)

(That said cause, from time to time, was thereafter ordered continued until the 26th day of June, 1923.) (See Minutes of the Court.)

(That on the 10th day of May, 1923, the defendant, Henry Heitmann, filed a petition for the return of property and exclusion of evidence. Said petition was in the words and figures following, to wit:

"In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,613.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HITMAN,

Defendant.

PETITION FOR RETURN OF PROPERTY AND EXCLUSION OF EVIDENCE.

To the Honorable, the Above-entitled Court:

The petition of Henry Hietmann respectfully shows: [39] That he was arrested on the 27th day of November, 1922, and charged with violating the "National Prohibition Act" and that there-

after, and on the 12th day of January, 1923, the United States Attorney, for the Northern District of California, filed an information against him charging him with a violation of said law.

That on the 27th day of November, 1922, your petitioner resided in a six-room dwelling-house at Salada Beach, in the county of San Mateo, State of California; that on said last-mentioned date a man by the name of Bert Poet was visiting him and had stopped there for a period of about two weeks; that the house above described was used on said last-mentioned date for dwelling purposes by your petitioner and his friend, Poet; that your petitioner slept in one room, Poet in another, and the remaining four rooms were used at said time for the accommodation of your petitioner and his friend; that one of said rooms was used as a kitchen in which there were chairs, a table, kitchen utensils, a stove and food; that your petitioner registered for the last general election and gave as his only residence the premises above occupied and that, thereafter, and at the primary and general elections, your petitioner voted in the precinct in the county of San Mateo, of which Salada Beach is a part; that your petitioner procured a certificate of registration which he is filing herewith.

That at the rear of the premises above described there is a barn and barnyard; that in the barnyard the petitioner had chickens, ducks, and pigeons; that said barn and barnyard are connected with said premises and constitute a part of said dwelling.

That on the last-mentioned date, at about the hour of eleven o'clock P. M., your petitioner and his friend, Bert [40] Poet, were asleep in the dwelling-house above described and at said time certain Federal Prohibition Enforcement Officers, illegally and unlawfully, without asking the permission of the petitioner, without the authorization of any search-warrant or order of Court, without a warrant for the arrest of your petitioner or his friend, without his knowledge or consent and in violation of the Fourth and Fifth Amendments to the Constitution of the United States and Section VI of the Act Supplemental to the National Prohibition Act, in violation of Section 25 of the National Prohibition Act and the Act of June 15, 1917, entered the premises of your petitioner, going first to the barn, above described, which at said time was closed, and illegally and unlawfully opened same, and illegally and unlawfully found therein two incomplete stills which the District Attorney describes as two forty-gallon stills which were dismantled at said time, eleven fifty-gallon barrels of mash, several sacks of corn and sugar and some empty barrels and bottles and other property, which they, the said Federal Prohibition Enforcement Officers, illegally and unlawfully, without the authorization of a search-warrant, and in violation of the petitioner's constitutional rights and the laws above mentioned seized and took away with them and they profess to hold the same against the will of your petitioner as evidence of a violation of the law on the part of your petitioner;

that said articles are held without process of law and your petitioner is entitled to their return and to have them excluded from evidence at the trial of said cause.

That thereafter, and on the same date, after the hour of eleven o'clock P. M., long after the sun had set, the above-mentioned Federal Prohibition Enforcement Officers surrounded [41] the dwelling-house of your petitioner, certain of them going to the front door and others remaining in the rear of said dwelling-house; that thereupon certain of said officers pounded on the front door of the petitioner's home, waking your petitioner and Poet, who were in bed and undressed; one of the number called out of the blackness of the night, 'Open the door, we are Federal Officers.' Your petitioner, who was uncertain whether they were criminal marauders or really in fact Federal Prohibition Enforcement Officers asked if they had a search-warrant, to which they made reply that they did not need any and said, 'If you don't open the door we are going to break in,' to which your petitioner replied, 'Wait till I get dressed,' and that thereupon one of their number, whom your petitioner has since been advised was not even a Federal Prohibition Enforcement Officer, but acting under their supervision, illegally and unlawfully opened one of the rear windows and climbed into the petitioner's dwelling-house, and he, illegally and unlawfully, went into said premises, opened the front door and allowed the Prohibition Enforcement Officers to enter; that, at said time, none of said

Prohibition Enforcement Officers had any search-warrant to search the petitioner's home; they had no warrant for his arrest or the arrest of any occupant of said home; they had made no previous purchase of liquor from said premises, no crime was being committed in their presence and your petitioner and his friend were asleep and oblivious to Prohibition Officers' previous acts; that said search was in violation of your petitioner's rights under the Fourth and Fifth Amendments to the constitution of the United States, in violation of Section 25 of the National Prohibition Act, Section VI of the Act Supplemental to the National Prohibition Act, and the Act of June 15, 1917; [42] that as a result of their illegal and unlawful conduct, in their said search, they illegally and unlawfully found in your petitioner's bedroom three gallons of liquid which the United States Attorney terms three gallons of moonshine brandy and that they, the Federal Prohibition Enforcement Officers, illegally and unlawfully, without the authorization of a search-warrant or warrant for the arrest of your petitioner and his friend in the night-time, seized said three gallons of liquid and took same away with them in violation of the Articles of the Constitution and the laws of the United States above set forth, and that the said Prohibition Enforcement Officers profess to hold said liquid as evidence of a violation of the law on the part of your petitioner and that said liquid is held without process of law and he is entitled to its return

and to have same excluded from evidence at the trial of said cause.

That all of said property seized in the premises above described is held without process of law.

That the Prohibition Enforcement Director, the Prohibition Enforcement Agents, and the United States Attorney propose to use said evidence at the trial of the above-entitled cause and that by reason thereof, and the facts set forth, the defendant's rights, under the Fourth and Fifth Amendments to the Constitution of the United States have been and will be violated unless the Court order the return of said articles or their exclusion from evidence at the trial of said cause.

WHEREFORE, the defendant prays that the United States Attorney, Marshal, Clerk and Prohibition Enforcement Officers be notified and the Court direct and order said United States Attorney, Marshal, Clerk and Prohibition Officers either to return said property, destroy same or exclude same and all knowledge derived from same from the trial of said cause.

HENRY HEITMANN,
Petitioner. [43]

EDWARD A. O'DEA,
Attorney for Petitioner.

VERIFICATION.

State of California,
City and County of San Francisco,—ss.

Henry Heitmann, being first duly sworn, deposes and says:

That he is the defendant and the petitioner

named in the above-entitled action; that he has read the foregoing petition for the return of property unlawfully seized and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

HENRY HEITMANN.

Subscribed and sworn to before me this 2d day of May, 1923.

[Seal] NATHANIEL HASTELL,
Notary Public in and for the City and County of San Francisco, State of California.

STIPULATION.

It is hereby stipulated by and between counsel for the above-mentioned parties that the above-mentioned motion may be heard without further notice from either party on the 21st day of May, 1923, at the hour of 10 o'clock A. M.

Dated: 4/9, 1923.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: Filed May 10, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [44]

EXHIBIT.

CERTIFICATE OF REGISTRATION.

Name: HENRY HEITMAN.
Occupation: Clerk.
Nativity: Germany.

Residence: San Pedro Precinct.
Post Office Address: Salada Beach, Calif.
Affiliate at ensuing Primary Election with Republican Party.
NATURALIZED:
County of San Francisco.
State of California.
Date: November 9, 1910.
Date of Registration: July 29, 1922.
Is able to read the Constitution in the English language.
Is able to write his name and mark his ballot.

State of California,
County of San Mateo,—ss.

I, Elizabeth M. Nash, County Clerk of said County, do hereby certify that the foregoing is a correct transcript of the registration of said Henry Heitman in said County.

ATTEST my hand and the Seal of the Superior Court this 1st day of December, 1922.

[Seal] ELIZABETH M. NASH,
Clerk.
By P. G. Congdon,
Deputy Clerk.

(That on the 26th day of June, 1923, in the minutes of the court appears the following order:)

"Before WILLIAM C. VAN FLEET.

No. 12,613.

UNITED STATES OF AMERICA

vs.

HENRY HITMAN.

Attorney for United States and defendant with his [45] attorney being present. Defendant withdrew his former plea of 'Not Guilty' as to the First Count of the Information filed herein and thereupon plead Guilty as to said First Count. Court ordered that all other Counts of Information be dismissed. Defendant was then called for judgment and after hearing defendant and attorneys, no cause appearing why judgment should not be pronounced, the Court ordered that the defendant, Henry Hitman, for offense of which he stands convicted, pay a fine in the sum of *Found* Hundred ($400.00) Dollars, or in default of payment thereof, defendant be imprisoned in the County Jail, County of San Francisco, State of California, until said fine is satisfied, said term of imprisonment not to exceed beyond period of four (4) months, and that, in event of imprisonment, defendant stand committed to custody of United States Marshal to execute said judgment and that a commitment issue.

After hearing attorney for defendant, the motion for exclusion and return of certain property was withdrawn."

(That thereupon, in the instant case, Mr. McDonald proceeded to make the opening argument for the Government, during which the following proceedings were had:) [46]

EXCEPTION No. 18.

Mr. McDONALD.—"In this case, Gentlemen, we have one of the most flagrant and persistent offenders against the Prohibition Act in this district. He was first apprehended by Agents Toft and Cory at Miramar—

Mr. O'DEA.—For the protection of the defendant's rights, your Honor, if this evidence was admitted for any purpose it was admitted for only one purpose, to show that if he possessed that liquor at this place, or that still, that he possessed it with a guilty knowledge. The District Attorney is not to be permitted to argue the proposition that because this man was arrested once before he is likely to have committed this offense here. I wish to take an exception to the District Attorney's remarks, and assign them as misconduct, and I ask your Honor to instruct the jury and tell the jury that if the evidence is to be considered at all the purpose for which the evidence is to be considered."

The COURT.—"That is just what I will do, Mr. O'Dea. I did not understand Mr. McDonald's opening statement or his argument to go any further than that."

Mr. O'DEA.—"He said, 'We have here one of the most flagrant bootleggers in California,' and that this man was arrested by Agent Cory at such and such a date. That is what I am objecting to."

The COURT.—"What is it you are objecting to, that he is a flagrant bootlegger?"

Mr. O'DEA.—"To that, and to his conclusion that he is a flagrant bootlegger from the fact that he was arrested before."

The COURT.—"Of course, the District Attorney has a perfect [47] right to narrate any evidence that has been admitted to the jury. The statement that he is a flagrant bootlegger is for the jury to determine, and not to be taken from the District Attorney. It will be determined from the evidence in this case. You will be instructed hereafter, Gentlemen, as to the purpose for which evidence of other crimes was admitted. Proceed, Mr. McDonald."

Mr. McDONALD.—"Now, Gentlemen, from those two facts and from the testimony you have heard to-day, from Mr. Powers' statement that he followed him to this place on numerous occasions, saw him there, and that he came in there while the raid was going on, and statements that he made to Mr. Powers at that time, and the statement that he made to Agent Bernhard that he wanted to fix this thing up, I am going to ask you, Gentlemen, what do you think of the case? Do you think there is any question, do you think there is any reasonable doubt that this man was running that still out there on Hampshire Street? It does not make any difference, Gentlemen, whether it was 950, or 590, or what the number was; he was running a still in the Northern District of California, and that is sufficient. You will be so instructed by the Court.

And, Gentlemen, when you consider the evidence, you can only find a verdict of guilty on all the counts in the information in this case."

Mr. O'DEA.—"I didn't wish to interrupt the District Attorney, but now that he is through with his opening argument, I wish to take an exception to the reference, after your Honor had mentioned the matter, to Salada Beach and Miramar as having nothing to do with the issues in this case, and as prejudicial to the rights of this defendant."

The COURT.—"Let the exception be noted."

Mr. O'DEA.—"And I ask your Honor to instruct the jury to disregard that statement of the District Attorney."

The COURT.—"I will instruct them to the best of my ability what the purpose of that testimony is." [48]

(Thereupon, the case was argued by Mr. O'Dea for the defendant and the closing argument was made by Mr. McDonald for the Government during which the following proceedings were had:)

EXCEPTION No. 19.

Mr. McDONALD.—"I am going to ask you to take into consideration his connection with that former case, his prior record, in connection with a still."

Mr. O'DEA.—"I object to that and take an exception to it, and ask your Honor to instruct the jury regarding it."

The COURT.—"Yes, I will instruct the jury in reference to it."

(That thereupon the Court proceeded to instruct the jury in the following words:) [49]

CHARGE TO THE JURY.

The COURT. (Orally.)—Gentlemen of the Jury: You will bear in mind that you at all times are the exclusive judges of the facts; nothing that either counsel say or that the Court says shall be taken as facts by you. While counsel have a right to present their views on the subject, their views of what the evidence proves, you are not bound to nor should you accept that unless it accords with the evidence as you have heard it from the witnesses. In a similar manner, no question that the Court may ask or anything that the Court may say in regard to the testimony is to be taken or accepted by you unless it squares with your idea of what that testimony is.

There has been filed here an information against this defendant and one other; you are not to take the information, itself, as any evidence whatsoever against this defendant; it is a mere matter of form, and the way in which the matter is brought before you for your consideration.

The defendant is presumed to be innocent. That presumption of innocence acts in his favor and accompanies him at all stages of the proceeding; that presumption of innocence would entitle him to a verdict of not guilty at your hands, unless the evidence presented on behalf of the Government satisfies your minds to a moral certainty and beyond all reasonable doubt. By a reasonable doubt is not meant any doubt; a case free from any doubt can rarely ever be presented in a court of justice; but

it means that kind of doubt which would appeal to you as reasonable men in the determination, say, of the most important affairs of your own lives.

The defendant has taken the stand in his own behalf. That, under our system, he is entitled to do. You should weigh his evidence with the same care and by the same token as you would the evidence of any other witness, that is to say, you should weigh his evidence in accordance with his appearance, his manner of testifying, [50] what he says, whether or not his evidence is consistent with itself and consistent with the other evidence in the case, bearing in mind all the time, however, Gentlemen, the interest of the defendant in the outcome of this action.

There appears to be a discrepancy here in the number of the street at which this still was found. You are not to consider that at all. The question as to whether or not it was 950 or 590 is of no concern in this case whatsoever, if you find that a still was actually found there.

The Court has admitted evidence that the defendant has pleaded guilty to the possession of a still upon another occasion at Salada Beach. You are to take that evidence into consideration, Gentlemen, only in your determination of the first count or charge in the complaint; that first count charges that the defendant here had in his possession jackass brandy and other things for the purposes of sale, and that in that he maintained a common nuisance. The so-called Volstead Act provides that where a man has in his possession alcoholic liquor

for the purpose of sale, that constitutes a nuisance. That evidence *has* introduces merely as bearing upon the question as to whether or not, if you find that this liquor was in the possession of this defendant, whether he had it there for a commercial purpose or for his own use. Under such circumstances, however, the law presumes that where a man has liquor in his possession he has it for purposes of sale; that *it* to say, if you are found with liquor in your possession in any other place than your private house, that constitutes *prima facie* evidence that you had it for sale. Therefore, on the first count, if you determine that he did have liquor in his possession, you are likewise to determine whether he had it for sale.

The second and third counts, Gentlemen, are practically identical; they charge that he had in his possession certain stills and other property designed for the manufacture of liquor. If you [51] find that they were actually in the possession of this defendant, or under his control in any manner whatsoever, or if he was any party to having them in possession, then you must find him guilty upon those counts.

I*f it* not necessary to establish that they were actually in his physical possession; if you believe that he had anything to do with them to the extent that they were under his control, or that he was engaged in their operation, or anything of that particular and immediate thought, then you must find him guilty upon that count.

Evidence has been admitted also that at the time of his arrest this defendant stated to the officers something to the effect that he was in a tight place, or something of that sort, and would like to fix it up. If you believe that evidence, Gentlemen, then you must determine in your own minds whether or not by that the defendant meant that he desired to bribe the officers, or whether he meant, as he testified, merely some way by which he could establish to them that he had nothing to do with the still and the other properties. If you find, however, that the intent and purpose of what he said was to bribe the officers, then I instruct you that evidence of an attempted bribe is evidence of the guilt of the defendant.

The man who is charged here with Mr. Heitmann has not been apprehended, and so you will not find any verdict as to him.

As to the defendant, Heitmann, you must find him guilty or not guilty upon each one of the three counts. However, the second and the third counts are practically the same, merely describing different parts of the property, so that the second and third counts are to be treated, if there was any crime committed, merely as one crime, and not two.

I will require an unanimous verdict at your hands. [52]

EXCEPTION No. 20.

(At the conclusion of the Court's charge and before said cause was submitted to the jury, counsel for the defendant addressed the Court and took

exception to part of said charge, in the following language:)

Mr. O'DEA.—"To protect the record, your Honor, I wish to take an exception to the remark your Honor made that it made no difference whether the house was numbered 950 or 590."

EXCEPTION No. 21.

(At the conclusion of the Court's charge and before the cause was submitted to the jury, the defendant took exception in open court to the Court's refusal to give an instruction. The proceedings and instruction were as follows:

Mr. O'DEA.—"I wish to take an exception to your Honor's refusal to give requested instruction regarding difference of number of premises whether same was 590 or 950. The instruction was as follows:

If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street, in the city and county of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21, of Title II of the 'National Prohibition Act.'

The COURT.—Yes, Mr. O'Dea. You may retire, Gentlemen."

(Whereupon, the jury retired at 2:10 P. M. on said last-mentioned date, and subsequently at 3:15 P. M. returned into court and rendered the verdict finding the defendant guilty on the first count, guilty on the second count and guilty on the third count.)

(That thereupon the Court arraigned the defendant for judgment at which time the defendant made a motion for a new trial which was by the Court denied on April 16, 1924, and to the Court's order denying said motion [53] the defendant, then and there, duly excepted.)

(Whereupon the defendant made a motion in arrest of judgment which was ordered by the Court denied on April 16, 1924, and to which order of the Court, the defendant, then and there, duly excepted.)

(Whereupon the Court rendered its sentence and judgment upon the defendant and granted to the defendant by order of the Court based upon the stipulations of the parties extensions of time in which to lodge and settle his proposed bill of exceptions. That said proposed bill of exceptions was lodged on the 28th day of August, 1924.)

That said defendant hereby presents the foregoing as his bill of exceptions and respectfully asks that the same be allowed, signed, sealed and made a part of the record in this case.

Dated October 9, 1924.

EDWARD A. O'DEA,
Attorney for Defendant. [54]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

NOTICE OF PRESENTATION OF BILL OF EXCEPTIONS.

To Sterling Carr, United States Attorney, and Thomas J. Sheridan, Assistant United States Attorney:

You will please take notice that the foregoing constitutes and is the bill of exceptions of the defendant in the above-entitled cause, and the said defendant will apply to the said Court to allow said bill of exceptions and to sign and seal the same as the bill of exceptions herein.

EDWARD A. O'DEA,
Attorney for the Defendant. [55]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

STIPULATION RE BILL OF EXCEPTIONS.

It is hereby stipulated and agreed that the foregoing bill of exceptions is correct and that the same may be signed, settled, allowed and sealed by the Court.

Dated: October 9, 1924.

STERLING CARR,

S.,

United States Attorney.

EDWARD A. O'DEA,

Attorney for Defendant. [56]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

ORDER SETTLING BILL OF EXCEPTIONS.

This bill of exceptions having been duly presented to the Court within the time allowed by law and the rules of the Court and within the time extended by the Court by orders duly and regularly made, is now signed, sealed and made a part of the records in this case, and is allowed as correct.

Dated: October 11th, 1924.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed October 14, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

THE UNITED STATES OF AMERICA

vs.

HENRY HEITMAN.

(VERDICT.)

We, the jury, find Henry Heitman, the defendant at the bar, Guilty on 1st Count; Guilty on 2d Count; Guilty on 3d Count.

A. F. BLOCK,
Foreman.

[Endorsed]: Filed April 16, 1924, at 3 o'clock and 15 minutes P. M. Walter B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [58]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HEITMAN,
Defendant.

MOTION FOR A NEW TRIAL.

Now comes Henry Heitman, defendant in the above-entitled cause and by Edward A. O'Dea, Esq., his attorney, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause and for reasons therefor, shows to the Court, the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in the case.

III.

That the evidence in said cause is insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial which errors were duly excepted to. [59]

V.

That the Court improperly instructed the jury to defendant's prejudice.

VI.

That the United States Attorney was guilty of misconduct which was prejudicial to the defendant's rights.

Dated at San Francisco, California, this 16th day of April, 1924.

_____,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant.

Due service of the within motion for new trial is hereby admitted this 17th day of April, 1924.

JOHN T. WILLIAMS,

U. S. Atty.

[Endorsed]: Filed Apr. 17, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [60]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

MOTION IN ARREST OF JUDGMENT.

Now comes the defendant, Henry Heitman, and respectfully moves this Court to arrest and withhold judgment in the above-entitled cause and that the verdict of conviction of said defendant heretofore given and made in the said cause be vacated

and set aside and declared to be null and void for each of the following causes and reasons:

I.

That Count One of the Information filed herein does not charge or state facts sufficient to constitute a public offenses under the laws of the United States against this defendant.

II.

That Count Two of the Information filed herein does not charge or state facts sufficient to constitute a public offenses under the laws of the United States against this defendant.

III.

That Count Three of the Information filed herein does not charge or state facts sufficient to constitute a [61] public offense under the laws of the United States against this defendant.

IV.

That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that Counts One, Two and Three of the Information on file herein do not state public offenses under the laws of the United States.

WHEREFORE by reason of the premises, the defendant prays this Honorable Court that the judgment herein be arrested and withheld and the conviction of the defendant be declared null and void.

Dated: April 16, 1924.

_____,

Defendant.

EDWARD A. O'DEA,
Attorney for Defendant.

[Endorsed]: Filed Apr. 17, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [62]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

THE UNITED STATES OF AMERICA

vs.

HENRY HEITMAN.

JUDGMENT ON VERDICT OF GUILTY.

J. F. McDonald, Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the information filed on the 13th day of June, 1923, charging him with the crime of violating National Prohibition Act of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 16th day of April, 1924, to wit:

We, the jury, find Henry Heitman the defendant at bar, Guilty on 1st Count, Guilty on 2d Count, Guilty on 3d Count.

A. F. BLOCK,
Foreman.

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Henry Heitman, having been duly convicted in this court of the crime of violating National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said [63] Henry Heitman be imprisoned for the period of one (1) year, and he pay a fine in the sum of Five Hundred ($500) Dollars; further ordered that in default of the payment of said fine that said defendant be imprisoned, until said fine be paid or until he be otherwise discharged in due course of law. Further ordered that said term of imprisonment be executed upon said defendant by imprisonment in the County Jail, County of San Francisco, California.

Judgment entered this 16th day of April, A. D. 1924.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 16, Judg. and Decrees, at page 280. [64]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

Now comes Henry Heitman, defendant herein, by Edward A. O'Dea, Esq., his attorney, and says that on the 16th day of April, 1924, this Court rendered judgment herein against the defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were permitted to the prejudice of the defendant all of which errors will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a transcript of the record in this cause, duly authenticated, may be sent to the *Circuit of*

Appeals, aforesaid, and that this defendant be awarded a supersedeas upon said judgment and all necessary and proper process including bail. [65]

Dated: May 6, 1924.

HENRY HEITMAN,
Defendant.
EDWARD A. O'DEA,
Attorney for Defendant.

Due service of the within petition for writ of error and supersedeas is hereby admitted this 6th day of May, 1924.

JOHN T. WILLIAMS,
U. S. Atty.

[Endorsed]: Filed May 7, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [66]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HEITMAN,
Defendant.

ASSIGNMENT OF ERRORS.

Henry Heitman, defendant in the above-entitled cause, and plaintiff in error herein, having peti-

tioned for an order from said Court permitting him to procure a writ of error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered in said cause against Henry Heitman, now makes and files with his said petition the following assignment of errors herein, upon which he will apply for a reversal of said judgment and sentence upon the said writ, and which said errors and each of them, are to the great detriment, injury and prejudice of the said defendant and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the District Court of the United States, for the Northern District of California, there is manifest error in this, to wit:

I.

The Court erred in permitting the United States Attorney over the objection of the defendant to keep two [67] witnesses for the Government in the courtroom at the same time before either had testified and after the Court had ordered all witnesses excluded except the one designated by the United States Attorney to remain with him during the trial. That the proceedings, objection and exceptions upon this subject were as follows:

Mr. O'DEA.—If your Honor please, at this time I ask that the witnesses be excluded.

The COURT.—All witnesses on both sides will be

excluded except the one designated by the District Attorney to remain with him during the trial.

Mr. O'DEA.—We have only the defendant.

Mr. McDONALD.—We ask to have Agent Powers remain here.

Mr. O'DEA.—Then I ask that Agent Powers be put on the stand first.

The COURT.—I cannot direct the order of proof on the part of the Government, Mr. O'Dea.

Mr. O'DEA.—Then that will defeat the purpose of my motion. I don't want these witnesses testifying to the same thing simply because one listens to the other.

The COURT.—You know, Mr. O'Dea, the rule is that the Government is entitled to designate one officer who may remain in the room. I cannot control the order in which they shall take the stand. However, I think there will be no objection to putting Mr. Powers on first.

Mr. McDONALD.—Your Honor, I want to put Mr. Bernhard on first.

The COURT.—Then I cannot control that. I am bound by the statute in the matter. [68]

Mr. O'DEA.—Exception.

The defendant and plaintiff in error assigns the Court's action as an abuse of discretion on the Court's part, defeating the purpose of the motion, of plaintiff in error and defendant.

II.

The Court erred in admitting in evidence over the objection of the defendant, testimony that the defendant had been arrested on another offense

prior to the date alleged in the information. That J. Bernhard, a witness for the Government, was asked the following question by the United States Attorney: "Do you know the defendant, Heitman, outside of this occasion?" and the additional question, "Had you arrested him before?" to which question the defendant and plaintiff in error objected specifying his grounds of objection as follows: That the same were incompetent, irrelevant and immaterial and that there was nothing involved which would authorize the United States Attorney to elicit the information sought and that same was prejudicial error on the part of the United States Attorney. To which the witness replied, "I did. Well, no, I was not one of the arresting officers, but I came there afterwards, after he was arrested."

To the Court's order overruling said objection, the defendant then and there duly excepted, and it was stipulated between the Court and counsel that defendant have an objection and exception to that whole line of testimony.

III.

The Court erred in refusing to grant the motion of defendant and plaintiff in error to strike out the following testimony, E. A. Powers, a witness for the Government, testified [69] as follows: "For the period of about six or seven weeks, I had been following Mr. Heitman on account of remarks *on account of remarks* he made around town and it led me into the vicinity of— "

To the Court's order denying said motion, defendant and plaintiff in error duly excepted.

IV.

The Court erred in overruling the objection of the defendant and plaintiff in error to questions asked Federal Agent I. H. Cory, a witness for the Government, and the testimony elicited therefrom: Said question was as follows: "Did you ever have occasion to arrest him?" The question was objected to by the defendant and plaintiff in error on the ground that it was incompetent, irrelevant and immaterial. The only question permitted on said subject would be: "Was the defendant ever convicted of a felony?" The witness answered in the affirmative and the objection was by the Court overruled, to which the defendant then and there duly excepted.

V.

The Court erred in overruling the objection of the defendant and plaintiff in error to questions asked Federal Agent I. H. Cory, a witness for the Government, and the testimony elicited therefrom. Said questions were as follows: "Did you ever meet the defendant at a place called Valmar?" and "What was he doing at that time and place?" That the defendant raised the same objection as those specified in assignment of error No. 4 and the Court overruled said objections. To which defendant and plaintiff in error then and there duly excepted. The testimony elicited was highly prejudicial to the defendant and was as follows: [70]

"He was in a barn at the Valmar Canyon, an old barn away up at the head of the canyon. He was there with a man by the name of Lep-

hardt, who I believe also was arrested. They were tacking up building paper; in fact, they had tacked up black paper all around this barn, and were preparing it to operate an illicit distillery. They had a large tub there in the center. Evidently, it was for a worm tap. There was no worm and no still there at the time. Agent Toft and I went into the place. He was there with his partner, Lephardt. They came out and laughed at us and said, 'You fellows are just about a week ahead of time.' "

VI.

The Court erred in denying the motion of the defendant and plaintiff in error to strike out the testimony given by Federal Agent I. H. Cory, a witness for the Government, as set forth in specification 5 of this assignment of errors when defendant had ascertained by cross-examination of said witness that the defendant was never convicted nor even arrested for any offense set forth in said fifth specification of error. To the Court's order denying said motion defendant and plaintiff in error duly excepted.

VII.

The erred in denying the motion of defendant and plaintiff in error for a directed verdict of not guilty made at the conclusion of the Government's case because there was not sufficient evidence to convict the defendant of any of the counts set forth in the information, and upon the further ground that there was a material variance between the [71] information and the proof adduced.

The information alleged that a nuisance was maintained at 950 Hampshire Street, San Francisco, and there was proof to show that if an offense was committed it was committed at 590 Hampshire Street, San Francisco.

To the Court's order denying said motion, the defendant and plaintiff in error duly excepted.

VIII.

The Court erred in granting the motion of the Government to strike out the following testimony on the ground that it was immaterial. Said testimony was given by Edward A. O'Dea, Esq., attorney for the defendant and plaintiff in error as a witness for the defendant and plaintiff in error. Said testimony was as follows:

> "On Sunday last, with Mr. Heitman, I saw a place at 950 Hampshire Street and if there was such a place it *would between* 21st and 22d Streets, San Francisco. I saw 590 Hampshire Street. It was the paint-shop, with the building described by the witnesses and it was on Hampshire Street, between 17th and 18th.

To the Court's order granting said motion defendant and plaintiff in error duly excepted.

IX.

The Court erred in overruling the objections of the defendant and plaintiff in error to questions asked the defendant and plaintiff in error on cross-examination by the United States Attorney when he was a witness testifying in his own behalf. The subject matter of said question was a previous

arrest at Salada Beach for having a "still." Said questions were objected to on the ground that they were incompetent, irrelevant and immaterial, not proper cross-examination, involving questions not at issue in the case; that they constituted prejudicial error on the part of the United [72] States Attorney and that the only question permitted on such a subject would be, "Was the defendant ever convicted of a felony?"

To the Court's orders overruling said objections, plaintiff in error and defendant duly took appropriate exceptions.

X.

The Court erred in admitting in evidence, over the objection of the defendant and plaintiff in error, the records of the United States District Court in case number 12,613 entitled "United States vs. Henry Heitman," the United States Attorney calling particular attention to the defendant's plea of guilty in that case. (The record showed that United States District Judge Van Fleet granted a motion excluding evidence to three counts in said information, and denied the motion in one count, to wit, having property in his possession designed for the unlawful manufacture of liquor. To this count the defendant had pleaded guilty.) The defendant's objection was upon the ground that the evidence was incompetent, irrelevant and immaterial and contained prejudicial matter which had nothing to do with the issues involved in the instant case.

To the Court's order overruling said objection, defendant and plaintiff in error duly excepted.

XI.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury at the close of the case he made certain remarks, which remarks were excepted to [73] by the defendant at the time, assigned as misconduct and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignment of misconduct, request of the Court and instruction by the Court were as follows:

Mr. McDONALD.—"In this case, Gentlemen, we have one of the most flagrant and persistent offenders against the Prohibition Act in this district. He was first apprehended by Agents Toft and Cory at Miramar—

Mr. O'DEA.—For the protection of the defendant's rights, your Honor, if this evidence was admitted for any purpose it was admitted for only one purpose, to show that if he possessed that liquor at this place, or that still, that he possessed it with a guilty knowledge. The District Attorney is not to be permitted to argue the proposition that because this man was arrested once before he is likely to have committed this offense here. I wish to take an exception to the District Attorney's remarks, and assign them as misconduct, and I ask your Honor to instruct the jury and tell the jury that if the evidence is to be considered at all the purpose for which the evidence is to be considered.

The COURT.—That is just what I will do, Mr. O'Dea. I did not understand Mr. McDonald's

opening statement or his argument to go any further than that.

Mr. O'DEA.—He said, "We have here one of the most flagrant bootleggers in California," and that this man was arrested by Agent Cory at such and such a date. That is what I am objecting to.

The COURT.—What is it you are objecting to, that he is a flagrant bootlegger? [74]

Mr. O'DEA.—To that, and to his conclusion that he is a flagrant bootlegger from the fact that he was arrested before.

The COURT.—Of course, the District Attorney has a perfect right to narrate any evidence that has been admitted to the jury. The statement that he is a flagrant bootlegger is for the jury to determine, and not to be taken from the District Attorney. It will be determined from the evidence in this case. You will be instructed hereafter, Gentlemen, as to the purpose for which evidence of other crimes was admitted. Proceed, Mr. McDonald." The Court afterwards, on this subject, gave this instruction:

The Court has admitted evidence that the defendant has pleaded guilty to the possession of a still upon *an* another occasion at Salada Beach. You are to take that evidence into consideration, Gentlemen, only in your determination of the first count or charge in the complaint; that first count charges that the defendant here had in his possession jackass brandy and other things for the purpose of sale, and that in that he maintained a common nuisance. The so-called Volstead Act provides that where a man has in his possession alcoholic liquor for the

purpose of sale, that constitutes a nuisance. That evidence was introduced merely as bearing upon the question as to whether or not, if you find that this liquor was in the possession of this defendant, whether he had it there for commercial purposes or for his own use. Under such circumstances, however, the law presumes where a man has liquor in his possession he has it for purposes of sale; that is to say, if you are found with liquor in your possession in any other place than your [75] private house, that constitutes *prima facie* evidence, that you had it for sale. Therefore, on the first count, if you determine that he did have liquor in his possession, you are likewise to determine whether he had it for sale."

XII.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury at the close of the case he made certain remarks, which remarks were excepted to by the defendant at the time, assigned as misconduct, and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignments of misconduct, request of the Court, and instruction by the Court were as follows:

Mr. McDONALD.—"Now, Gentlemen, from those two facts and from the testimony you have heard to-day, from Mr. Powers' statement that he followed him to this place on numerous occasions, saw him there, and that he came in there while the raid was going on, and statements that he made to

Mr. Powers at that time, and the statement that he made to Agent Bernhard that he wanted to fix this thing up, I am going to ask you, Gentlemen, what do you think of the case? Do you think there is any question, do you think there is any reasonable doubt that this man was running that 'still' out there on Hampshire Street? It does not make any difference, Gentlemen, whether it was 950 or 590 or what the number was; he was running a still in the Northern District of California, and that is sufficient. You will be so instructed by the Court. And, Gentlemen, when you consider that evidence, you can only find a verdict of guilty on all the counts in the information in [76] this case.

Mr. O'DEA.—I didn't wish to interrupt the District Attorney, but now that he is through with his opening argument, I wish to take an exception to the reference, after your Honor had mentioned the matter, to Salada Beach and Miramar as having nothing to do with the issues in this case, and as prejudicial to the rights of this defendant.

The COURT.—Let the exception be noted.

Mr. O'DEA.—And I ask your Honor to instruct the jury to disregard that statement of the District Attorney.

The COURT.—I will instruct them to the best of my ability what the purpose of that testimony is."

(Thereafter, the Court in its instructions to the jury upon the subject here under discussion gave

only the instruction set forth in plaintiff in error's specifications of error No. XI.)

XIII.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury in reply to counsel for the defendant's argument to the jury he closed same with certain remarks; which remarks were excepted to by the defendant at the time, assigned as misconduct and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignment of misconduct, request of the Court and instruction by the Court were as follows:

Mr. McDONALD.—"I am going to ask you to take into consideration his connection with that former case, his prior record, in connection with a still. [77]

Mr. O'DEA.—I object to that and take an exception to it, and ask your Honor to instruct the jury regarding it.

The COURT.—Yes, I will instruct the jury in reference to it."

(Thereafter the Court in its instruction to the jury upon the subject here under discussion gave only the instruction set forth in plaintiff in error's assignment of errors No. XI.)

XIV.

The Court erred in giving the following instruction over the objection of the defendant and plaintiff in error to which instruction, defendant and plaintiff in error duly excepted:

"There appears to be a discrepancy here in the number of the street at which this still was found. You are not to consider that at all. The question as to whether or not it was 950 or 590 is of no concern in this case whatsoever, if you find that a still was actually found there."

XV.

The Court erred in refusing to give the following instruction requested by defendant and plaintiff in error:

"If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street, in the city and county of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21, of Title II of the National Prohibition Act."

To the Court's refusal to give said instruction plaintiff in error and defendant duly excepted.

HENRY HEITMAN,
Defendant. [78]

EDWARD A. O'DEA,
Attorney for Defendant.

Due service of the within assignment of errors is hereby admitted this 6th day of May, 1924.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: Filed May 7, 1924, Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [79]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMAN,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND SUPERSEDEAS.

The writ of error and the supersedeas herein prayed for by Henry Heitman, defendant and plaintiff in error, pending the decision upon said writ of error, is hereby allowed and the defendant is admitted to bail upon the writ of error in the sum of Three Thousand and No/100 ($3,000.00) Dollars.

The bond for costs of the writ of error is hereby fixed at Two Hundred Fifty and No/100 ($250.00) Dollars.

Dated at San Francisco, California, this 7th day of May, 1924.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed May 7, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [80]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 80 pages, numbered from 1 to 80, inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of United States of America vs. Henry Heitman, No. 13,551, as the same now remain on file and of record in this office; said transcript having been prepared in accordance with the praecipe (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of thirty-one dollars and fifteen cents ($31.15) and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error, and original citation on writ of error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court this 8th day of November, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [81]

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Henry Heitmann, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Henry Heitmann, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that er-

ror, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 11th day of October, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By C. W. Calbreath,
Deputy.

Allowed by:

JOHN S. PARTRIDGE,
District Judge.

Rec'd 10/14/24.

STERLING CARR,
S.,
U. S. Atty.

[Endorsed]: No. 13,551. United States District Court for the Northern District of California. Henry Heitmann, Plaintiff in Error, vs. United States of America, Defendant in Error. Original Writ of Error. Filed Oct. 14, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [82]

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain

schedule to this writ annexed, the record and all procedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 14th day of October, A. D. 1924, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern Dist. of Calif.

By C. M. Taylor,
Deputy Clerk. [83]

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, and to Sterling Carr, Esq., United States Attorney, and to Thomas J. Sheridan, Esq., Assistant to the United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's

Office of the United States District Court for the Northern District of California, wherein Henry Heitmann is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 11th day of October, A. D. 1924.

JOHN S. PARTRIDGE,
United States District Judge.

Due service of the within citation and the receipt of a copy thereof is hereby admitted this 14th day of October, 1924.

STERLING CARR,
United States Attorney.

[Endorsed]: No. 13,551. United States District Court for the Northern District of California. Henry Heitmann, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error (Original). Filed Oct 14, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [84]

[Endorsed]: No. 4393. United States Circuit Court of Appeals for the Ninth Circuit. Henry Heitman, Plaintiff in Error, vs. United States of

America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed November 11, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.